

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Roberto Rocha-Narez

NO. CR 06-00750 JW
NO. CV 08-00329 JW

Petitioner,

v.

United States of America,

Respondent.

**ORDER DISMISSING PETITIONER'S
MOTION FOR WRIT OF HABEAS
CORPUS PURSUANT TO 28 U.S.C. § 2255
WITH PREJUDICE**

I. INTRODUCTION

Presently before the Court is Petitioner's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255, which the Court construes as a Petition for Writ of Habeas Corpus. (hereafter, "Motion," Docket Item No. 15.)¹ Petitioner is acting in *pro se*. In response to the Court's Order to Show Cause,² Respondent has filed a timely Opposition.³

On November 30, 2006, pursuant to Rule 11(c)(1)(C) of Fed. R. Crim. P., Petitioner pleaded guilty to one count of Illegal Reentry Following Deportation under Title 8 U.S.C. § 1326. (See Plea Agreement at 1, Docket Item No. 11.) The Court accepted the Plea Agreement. (Id.) On January 29, 2007, Judgment was entered against Petitioner pursuant to the terms of the binding Plea

¹ All docket citations in this Order are to the criminal case, CR 06-00750.

² (Docket Item No. 22.)

³ (United States' Opposition to Petitioner's Motion to Vacate, Set Aside, or Correct the Sentence Pursuant to 28 U.S.C. § 2255, hereafter, "Response," Docket Item No. 26.) Respondent has also filed a Motion for Order Finding of Waiver of Privilege. (Docket Item No. 24.) In light of the disposition in this Order, the Court DENIES Respondent's Motion as moot.

1 Agreement. (See Docket Item No. 14.) Petitioner was committed to the custody of the United
2 States Bureau of Prisons for a total term of 37 months. (Id.) Petitioner filed this Motion on January
3 14, 2008.

4 On July 28, 2009, Petitioner was released from BOP/FCI Sheridan, Oregon to I.C.E. in
5 Portland, Oregon. (Response at 2.) On July 29, 2009, Petitioner was deported to Mexico. (Id.)

6 **II. DISCUSSION**

7 **A. Standard of Review**

8 A motion to vacate, set aside, or correct a sentence of a person in federal custody pursuant to
9 28 U.S.C. § 2255 entitles a prisoner to relief “[i]f the court finds that . . . there has been such a denial
10 or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to
11 collateral attack.”

12 The standard of review of § 2255 petitions is “stringent” and the court “presumes earlier
13 proceedings were correct.” United States v. Nelson, 177 F. Supp. 2d 1181, 1187 (D. Kan. 2001). In
14 a successful § 2255 motion, the “[petitioner] must show a defect in the proceedings which resulted
15 in a ‘complete miscarriage of justice.’” Id. (quoting Davis v. United States, 417 U.S. 333, 346
16 (1974)). “[R]elief is not available merely because of error that may have justified reversal on direct
17 appeal.” United States v. Frady, 456 U.S. 152, 165 (1982); United States v. Addonizio, 442 U.S.
18 178, 184 (1979).

19 The district court shall hold an evidentiary hearing on a prisoner's § 2255 petition, “[u]nless
20 the motion and the files and records of the case conclusively show that the prisoner is entitled to no
21 relief.” 28 U.S.C. § 2255. A court need not hold an evidentiary hearing where the prisoner's
22 allegations, when viewed against the records, either do not state a claim for relief or are so palpably
23 incredible as to warrant summary dismissal. Shah v. United States, 878 F.2d 1156, 1158 (9th Cir.),
24 cert. denied, 493 U.S. 869 (1989); United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984),
25 cert. denied, 470 U.S. 1058 (1985). “Merely conclusory statements in a § 2255 motion are not
26 enough to require a hearing.” United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993).

1 **B. Petitioner’s Claims**

2 Petitioner asserts a variety of grounds for relief under § 2255. Since some grounds may be
3 barred by the Plea Agreement, the Court first examines the language of the Agreement.

4 The right to bring a collateral attack under § 2255 is statutory, and a “knowing and voluntary
5 waiver of a statutory right is enforceable.” United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.
6 1993), cert. denied, 508 U.S. 979 (1993). However, a plea agreement does not waive the right to
7 bring a § 2255 petition unless it does so expressly. United States v. Pruitt, 32 F.3d 431, 433 (9th
8 Cir. 1994).

9 Here, in the binding Plea Agreement, Petitioner stated as follows:

10 I agree to give up my right to appeal my conviction, the judgment, and orders of the
11 Court. I also agree to waive any right I may have to appeal any aspect of my sentence,
including any order relating to forfeiture and/or restitution.

12 I agree not to file any collateral attack on my conviction or sentence, including a
13 petition under 28 U.S.C. § 2255 or 28 U.S.C. § 2241, or motion under 18 U.S.C. § 3582, at
any time in the future after I am sentenced, except for a claim that my constitutional right to
the effective assistance of counsel was violated.

14 I confirm that I have had adequate time to discuss this case, the evidence, and this
Agreement with my attorney, and that [she] has provided me with all the legal advice that I
requested.

15 I confirm that my decision to enter a guilty plea is made knowing the charges that
16 have been brought against me, any possible defenses, and the benefits and possible
detriments of proceeding to trial. I also confirm that my decision to plead guilty is made
voluntarily, and no one coerced or threatened me to enter into this Agreement.

17 (Plea Agreement ¶¶ 4-5, 15, 17.) Based on the language of the Plea Agreement, Petitioner has
18 waived his right to petition under § 2255 on any basis other than ineffective assistance of counsel.
19 Accordingly, the Court will consider only Petitioner’s claim for ineffective assistance of counsel.

20 Petitioner contends that he was denied his right to effective assistance of counsel under the
21 Sixth Amendment because his counsel was inexperienced, advised Petitioner to plead guilty without
22 informing him of “material facts,” failed to advise him of “Blakely and Booker and Fanfan” with
23 regard to a sentencing enhancement, was unprepared to present Petitioner’s case at trial, failed to
24 raise Petitioner’s claim of a violation of his rights under the Vienna Convention article 36, “utilized
25 threats and extortion to coerce [Petitioner] to enter into [the Plea Agreement],” and failed to explain
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1 to Petitioner that his Plea Agreement would waive his right to appeal his conviction or sentence.
2 (Motion at 2-5.)

3 A convicted petitioner's claim that counsel's assistance was so defective as to require
4 reversal of a conviction has two components. Strickland v. Washington, 466 U.S. 668, 687 (1984).
5 First, the petitioner must show "that counsel's performance was deficient." Id. Second, the
6 petitioner must show "that the deficient performance prejudiced the defense." Id. Unless a
7 petitioner makes both showings, it cannot be said that the conviction resulted from "a breakdown in
8 the adversary process that renders the result unreliable." Id.

9 Here, several of Petitioner's grounds for claiming ineffective assistance are directly
10 contradicted by his sworn statements in the Plea Agreement. For example, Petitioner's Plea states
11 that he made the Plea voluntarily and without coercion, and that he acknowledges that he waived his
12 right to appeal. At both the change of plea hearing and the sentencing, the Court thoroughly *voir*
13 *dire* Petitioner to ensure that he understood the terms of his binding Plea Agreement. (See Docket
14 Item Nos. 12, 13.) On Petitioner's representations, the Court accepted Petitioner's Plea and
15 sentenced him pursuant to the Plea. Furthermore, Petitioner has not presented any credible evidence
16 that his counsel was inexperienced, much less to the point of being deficient. As to the Vienna
17 Convention, Petitioner's claim fails because neither the Ninth Circuit nor the U.S. Supreme Court
18 have recognized Vienna Convention article 36 as creating judicially enforceable rights for criminal
19 petitioners. See Gonzales v. Harrington, No. ED CV 08-0931 GHK (FMO), 2009 WL 1658123, at
20 *14 (C.D. Cal. June 11, 2009).

21 With respect to Petitioner's claim that his counsel's performance was deficient because she
22 failed to inform him of the impact of "Blakely and Booker and Fanfan," the Court finds that this
23 claim is without merit.⁴ Petitioner's claim is essentially that his counsel failed to advise him of an
24 unlawful enhancement to his sentence based on a prior conviction. (See Motion at 4-7.) However,
25 contrary to Petitioner's claim, by the time of Petitioner's guilty plea in 2006, the United States

26 ⁴ See United States v. Booker, 543 U.S. 220 (2004); United States v. Fanfan, 542 U.S. 956
27 (2004); Blakely v. Washington, 542 U.S. 296 (2004).

1 Supreme Court had decided that a defendant's sentence could be increased based upon the fact of a
2 prior conviction not admitted or proved to a jury. See Almendarez-Torres v. United States, 523 U.S.
3 224 (1998). Thus, the Court finds that Petitioner has failed to show that his counsel's performance
4 was deficient.

5 In sum, none of Petitioner's grounds for habeas relief have merit. Accordingly, the Court
6 DISMISSES Petitioner's Motion with prejudice.

7 **C. Certificate of Appealability**

8 At issue is whether the Court should issue a certificate of appealability.

9 In a § 2255 proceeding, "an applicant cannot take an appeal unless a circuit justice or a
10 circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App.
11 P. 22(b). Such certification may issue "only if [petitioner] has made a substantial showing of the
12 denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of
13 appealability indicating which issues satisfy the required showing or must state the reasons why
14 such a certificate should not issue. Fed. R. App. P. 22(b)(1).

15 To satisfy the § 2253(c)(2) standard, the petitioner "must demonstrate that reasonable jurists
16 would find the district court's assessment of the constitutional claims debatable or wrong." Slack v.
17 McDaniel, 529 U.S. 473, 484 (2000); Hiivala v. Wood, 195 F.3d 1098, 1104 (9th Cir. 1999). When
18 a petition is denied based on procedural grounds without reaching the merits of the claim, a
19 certificate of appealability shall be issued if the petitioner makes two showings. See Slack, 529 U.S.
20 at 484-85. First, a petitioner must show that reasonable jurists would find "it debatable whether the
21 petition states a valid claim of the denial of a constitutional right." Id. at 484. Second, a petitioner
22 must show that reasonable jurists would find "it debatable whether the district court was correct in
23 its procedural ruling." Id. Both showings are required before a certificate of appealability will be
24 issued. See Lambright v. Steward, 220 F.2d 1022, 1026-27 (9th Cir. 2000).

25 Here, Petitioner does not satisfy the standard for a certificate of appealability for a denial on
26 the merits or on procedural grounds. Petitioner has not made any showing of a denial of a
27 constitutional right. Rather, Petitioner brings unsupported claims of ineffective assistance of
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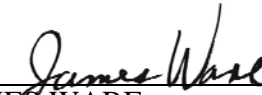
1 counsel and attempts to challenge his sentence without any articulated reason supported in the
2 record. Reasonable jurists could not debate the Court's conclusion.

3 Accordingly, the Court finds that Petitioner has not made the required showing for a
4 certificate of appealability.

5 **III. CONCLUSION**

6 The Court DISMISSES Petitioner's Motion for Writ of Habeas Corpus Pursuant to § 2255
7 with prejudice. No certificate of appealability shall be issued for this appeal.

8
9 Dated: January 29, 2010



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Jeffrey Benjamin Schenk jeffrey.b.schenk@usdoj.gov

3 Roberto Rocha-Narez
10582-111
4 Federal Correctional Institution
PO Box 5000
5 Sheridan, OR 97378-5000

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7 **Dated: January 29, 2010**

Richard W. Wieking, Clerk

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9 **By: /s/ JW Chambers**
Elizabeth Garcia
Courtroom Deputy

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